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ABSTRACT

In 1981 the federal courts decided hundreds of cases involving schools relating to civil rights statutes, the First Amendment, the Fourth Amendment, and the equal protection clause of the Fourteenth Amendment. Lawsuits concerning the handicapped involved such issues as the costs of determining what is equal opportunity in education, full-time interpreters for deaf children, catheterization as a related service, and the extended school year. Civil rights cases involved the application of Title IX to employment and to collegiate athletics; Title VII and the issue of equal pay for equal work among female and male prison guards; and the application of the Age Discrimination in Employment Act to school personnel. The use of intelligence tests for the placement of black students was found to be a violation of the equal protection clause. Other cases involved illigal aliens; the constitutionality of the one-house Congressional veto; free speech and censorship of school library books; the Fourth Amendment and searches and seizures; the Civil Rights Attorneys' Fees Awards Act of 1976; the liability of parents for acts of students; and educational malpractice. (MLF)

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RECENT U.S. COURT DECISIONS AFFECTING EDUCATION

Gwendolyn H. Gregory

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PRESENTATION BEFORE OREGON SCHOOL LAW CONFERENCE 12/3/81
"RECENT U.S. COURT DECISIONS AFFECTING EDUCATION"
BY GWENDOLYN H. GREGORY

TEN OR TWELVE YEARS AGO A SPEECH ON THE YEAR'S DEVELOPMENTS IN SCHOOL LAW WOULD HAVE BEEN VERY SHORT INDEED. AS A MATTER OF FACT, WHEN I WAS IN LAW SCHOOL THE ONLY EXTANT SCHOOL CASE OF ANY SIGNIFICANCE WAS BROWN V. BOARD OF EDUCATION -- THE LANDMARK SCHOOL DESEGREGATION CASE. THIS WAS TRUE EVEN THOUGH 42 USC 1983, UNDER WHICH MANY PLAINTIFFS ARE NOW SEEKING DAMAGES OF SCHOOL BOARD MEMBERS AND ADMINISTRATORS, WAS PASSED WAY BACK IN 1871. TIMES HAVE CHANGED. LAST YEAR THE FEDERAL COURTS DECIDED HUNDREDS OF CASES INVOLVING SCHOOLS RELATING TO CIVIL RIGHTS STATUTES, THE 1ST AMENDMENT, 4TH AMENDMENT, EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

HANDICAPPED

PROBABLY THE HOTTEST TOPIC IN SCHOOL LAW TODAY IS THE ISSUE OF EDUCATION OF THE HANDICAPPED. THE PROBLEMS RAISED IN THE LAWSUITS ARE AT ONCE EDUCATIONAL -- WHICH METHODOLOGY IS BETTER? -- AND FINANCIAL -- MUST SCHOOL DISTRICTS PROVIDE THE BEST EDUCATION AVAILABLE EVEN THOUGH THE COSTS ARE PROHIBITIVE?

IN APRIL, THE U.S. SUPREME COURT DECIDED A CASE WHICH SHOULD BE VERY HELPFUL TO SCHOOL DISTRICTS WHICH ARE ARGUING THAT COST MUST BE ONE OF THE CONSIDERATIONS TO BE TAKEN INTO ACCOUNT WHEN MAKING A DETERMINATION AS TO WHAT SERVICES TO PROVIDE A STUDENT, WHETHER OR NOT HE OR SHE IS HANDICAPPED. THE CASE ARISES OUT OF PENNSYLVANIA AND RELATES TO FUNDING UNDER THE DEVELOPMENTALLY DISABLED ASSISTANCE ACT OF THE PENNHURST HOSPITAL. THE COURT HELD THAT THE FACT THAT CONGRESS

EA 014 324

APPROPRIATED A SUM "WOEFULLY INADEQUATE" -- IN THE WORDS OF THE COURT -- TO MEET THE FINANCIAL BURDEN OF PROVIDING "APPROPRIATE" TREATMENT IN THE "LEAST RESTRICTIVE" SETTING MUST HAVE MEANT THAT CONGRESS HAD A LIMITED PURPOSE IN MIND WHEN IT SET OUT IN THE STATUTE THE SO-CALLED BILL OF RIGHTS, WHICH ENUMERATED RIGHTS SUCH AS "APPROPRIATE" TREATMENT IN THE "LEAST RESTRICTIVE" SETTING. ALTHOUGH THIS CASE WAS NOT DECIDED UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT, KNOWN AS P.L. 94-142, THE CASE IS IMPORTANT TO SCHOOLS BECAUSE IT IS ANOTHER INDICATION THAT THE SUPREME COURT FEELS THAT COST MAY BE RELEVANT IN MAKING A DETERMINATION OF WHAT IS "EQUAL OPPORTUNITY" UNDER P.L. 94-142. THE EARLY HANDICAP CASES HELD THAT COST IS NO DEFENSE TO A CHARGE OF DISCRIMINATION. INTERESTINGLY, HOWEVER, ALL OF THESE EARLY CASES, WHICH ARE CITED AT GREAT LENGTH BY PLAINTIFFS IN EVERY LAWSUIT INVOLVING A HANDICAPPED STUDENT, ARE U.S. DISTRICT COURT CASES, AND SEVERAL ARISE OUT OF THE SAME COURT -- THE EASTERN DISTRICT OF PENNSYLVANIA -- FURTHER, THE FACTS IN THOSE CASES ARE UNFORTUNATE, WITH SCHOOLS NOT ONLY PROVIDING UNEQUAL OPPORTUNITY TO HANDICAPPED CHILDREN, BUT VIRTUALLY NO OPPORTUNITY.

THE COURT IN PENNHURST NOTES THAT THE ACT IN QUESTION WAS PASSED BY THE CONGRESS PURSUANT TO ITS SPENDING POWER RATHER THAN UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT. THUS, "THE LEGITIMACY OF THE CONGRESS' POWER TO LEGISLATE...RESTS ON WHETHER THE STATE VOLUNTARILY AND KNOWINGLY ACCEPTS THE TERMS OF THE 'CONTRACT'... THERE CAN, OF COURSE, BE NO KNOWING ACCEPTANCE IF A STATE IS UNAWARE OF THE CONDITIONS OR IS UNABLE TO ASCERTAIN WHAT IS EXPECTED OF IT. ACCORDINGLY, IF CONGRESS INTENDS TO IMPOSE A CONDITION ON THE GRANT OF FEDERAL MONEYS, IT MUST

DO SO UNAMBIGUOUSLY." IT WOULD APPEAR THAT MANY OF THE REQUIREMENTS BEING MADE UNDER 94-142 WERE ALSO NOT EXPECTED BY SCHOOL DISTRICTS WHEN THEY APPLIED FOR GRANTS -- REQUIREMENTS SUCH AS CATHERIZATION, FOR EXAMPLE.

THE SUPREME COURT HAS RECENTLY GRANTED REVIEW IN A CASE RELATING TO EDUCATIONAL METHODOLOGY. THE CASE MAY PROVIDE SOME INSIGHT INTO THE QUESTION OF WHAT FLEXIBILITY SCHOOL DISTRICTS HAVE IN DECIDING THE METHODOLOGY FOR TEACHING HANDICAPPED CHILDREN. BOARD OF EDUCATION V. ROWLEY IS A SUIT BY THE PARENTS OF A DEAF CHILD WHO SEEK A FULLTIME SIGN LANGUAGE INTERPRETER FOR THEIR CHILD IN THE CLASSROOM. THE SCHOOL DISTRICT HAD REFUSED TO PROVIDE AN INTERPRETER BECAUSE THE CHILD WAS ABOVE THE MEDIAN IN HER CLASS BECAUSE OF HER KNOWLEDGE OF LIP READING, AS WELL AS BECAUSE OF OTHER SERVICES (SUCH AS A HEARING AID) WHICH THE DISTRICT PROVIDED. THERE WAS ALSO A DISAGREEMENT BETWEEN THE SCHOOL DISTRICT AND THE PARENTS AS TO WHETHER THE INTERPRETER WOULD BE HELPFUL OR HARMFUL TO THE CHILD, THE PARENTS FAVORING "TOTAL COMMUNICATION" THROUGH THE USE OF AN INTERPRETER. THE DISTRICT COURT HELD THAT EVERY DEAF CHILD DOES BETTER IN CLASS WITH AN INTERPRETER (AN ARGUMENT DISPUTED BY THE DISTRICT), AND THEREFORE EVERY DEAF CHILD SHOULD BE PROVIDED AN INTERPRETER. THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT BUT EMPHASIZED THAT THE HOLDING WAS TO BE LIMITED TO THE FACTS IN THE PARTICULAR CASE AND NOT SEEN AS A CLASS ACTION IN WHICH THE NEEDS OF ALL DEAF CHILDREN WERE BEING DETERMINED. THE DEPARTMENT OF JUSTICE, IN ITS BRIEF ARGUING AGAINST GRANT OF REVIEW BY THE SUPREME COURT STATED, HOWEVER, THE DEPARTMENT'S BELIEF THAT P.L. 94-142 REQUIRES

THE SCHOOL DISTRICT TO DEVELOP A PLAN WHICH IS TAILORED TO ACHIEVE THE CHILD'S MAXIMUM POTENTIAL. THE "MAXIMUM POTENTIAL" STANDARD, OF COURSE, GOES FAR BEYOND A STANDARD WHICH HAS EVER BEEN USED IN THE CONTEXT OF PUBLIC EDUCATION. WOULD THAT IT WERE POSSIBLE TO GUARANTEE THAT ALL CHILDREN COULD REACH THEIR MAXIMUM POTENTIAL. HOPFULLY, THE SUPREME COURT WILL PROVIDE SOME GUIDANCE WHEN IT DECIDES ROWLEY AS TO THE COURT'S INTERPRETATION OF THE PHRASE "FREE APPROPRIATE PUBLIC EDUCATION" IN THE CONTEXT OF 94-142. THIS IS AN IMPORTANT CASE AND I FIND IT QUITE INTERESTING THAT THE COURT GRANTED REVIEW EVEN IN LIGHT OF THE GOVERNMENT'S OPPOSITION TO REVIEW.

IN JUNE THE SUPREME COURT DENIED REVIEW OF ANOTHER CASE ARISING OUT OF PENNSYLVANIA, ARMSTRONG V. KLINE, IN WHICH THE 3RD CIRCUIT HAD RULED THAT IT WAS A VIOLATION OF 94-142 TO REFUSE TO PROVIDE MORE THAN A 180-DAY EDUCATION FOR ANY HANDICAPPED CHILD, REGARDLESS OF THE NEEDS OF THE CHILD. THE PLAINTIFFS HAD ARGUED THAT THE PLAINTIFF CLASS OF CHILDREN REGRESSED TO SUCH AN EXTENT DURING SUMMER BREAKS THAT THEY WERE EFFECTIVELY DENIED AN EDUCATION. PENNSYLVANIA, ON THE OTHER HAND, ARGUED THAT TO REQUIRE A STATE OR SCHOOL DISTRICT TO PROVIDE SERVICES BEYOND THE 180-DAY SCHOOL YEAR PROVIDED TO OTHER CHILDREN WAS TO GO BEYOND THE "EQUAL OPPORTUNITY" STANDARD OF THE LAW. ANOTHER CASE INVOLVING THIS SAME ISSUE IS IN THE 11TH CIRCUIT INVOLVING THE GEORGIA 180-DAY SCHOOL YEAR. THE FACTS ARE A LITTLE BETTER IN THAT CASE AND IT IS LIKELY THAT WHEN IT REACHES THE SUPREME COURT THE GOVERNMENT, THIS TIME, WILL URGE THE COURT TO GRANT REVIEW. THE JUSTICE DEPARTMENT HAD ARGUED AGAINST HIGH COURT REVIEW IN THE ARMSTRONG CASE. ANOTHER CASE INVOLVING THE EXTENDED SCHOOL YEAR, MCDANIEL V. HELM (OUT OF THE 11TH CIRCUIT), IS PENDING SUPREME COURT DECISION ON PETITION FOR CERT.

THE SUPREME COURT DENIED REVIEW LAST MONTH IN THE CASE OF S-1 V. TURLINGTON, WHICH IS THE LEADING CASE ON THE QUESTION OF DISCIPLINE OF HANDICAPPED CHILDREN. THE FIFTH CIRCUIT IN THAT CASE HELD THAT A SCHOOL BOARD MAY NOT EXPEL A HANDICAPPED CHILD WITHOUT FIRST DETERMINING WHETHER THE CONDUCT WHICH LED TO THE EXPULSION WAS THE RESULT OF THE CHILD'S HANDICAP. THE COURT ALSO HELD THAT SINCE EXPULSION IS A "CHANGE OF PLACEMENT" UNDER 94-142, THAT EVEN WHERE THE ACTION FOR WHICH THE CHILD IS DISCIPLINED BEARS NO RELATIONSHIP TO THE HANDICAP, THERE IS STILL A DUTY TO COMPLY WITH ALL OF THE DUE PROCESS PROVISIONS OF THE ACT. PUT SIMPLY, A SCHOOL DISTRICT MAY NOT EXPEL A HANDICAPPED CHILD UNDER ANY CIRCUMSTANCES. THIS ISSUE -- I SHOULD NOTE -- IS UNDER STUDY BY THE DEPARTMENT OF EDUCATION PURSUANT TO ITS REVIEW OF ALL REGULATIONS UNDER PRESIDENT REAGAN'S DEREGULATION EDICT. IT MAY BE THAT THE DEPARTMENT WILL SEE FIT TO RELATE DISCIPLINE TO THE PROVISION OF "EQUAL OPPORTUNITY" RATHER THAN PROVIDING AN ABSOLUTE BAR TO EXPULSION OF HANDICAPPED CHILDREN, EVEN WHERE THE HANDICAP BEARS NO RELATIONSHIP TO THE CONDUCT.

ANOTHER CASE WILL BE IN THE SUPREME COURT WITHIN THE MONTH ON A PETITION FOR REVIEW. THAT CASE, TOCARCIK V. FOREST HILLS SCHOOL DISTRICT, INVOLVES THE VERY IMPORTANT QUESTION OF WHETHER CATHETERIZATION IS A "RELATED SERVICE" UNDER 94-142.

THE CASE AROSE OUT OF THE FAILURE OF PLAINTIFF'S PARENTS AND THE SCHOOL STAFF TO AGREE ON THE PROPER CONTENT OF AN INDIVIDUALIZED EDUCATION PROGRAM FOR AMBER TOCARCIK, NOW A FOURTH GRADE STUDENT, WHO IS PARALYZED FROM THE WAIST DOWN BY A CON-

GENITAL PHYSICAL DEFECT. THE PARENTS CONTENDED THAT THE SCHOOL WAS REQUIRED TO PROVIDE CATHETERIZATION SERVICES FOR AMBER (CATHETERIZATION IS THE PROCESS BY WHICH A TUBE IS INSERTED INTO THE BODY IN ORDER TO DRAIN THE BLADDER); THE SCHOOL ARGUED THAT STATE LAW DID NOT REQUIRE THAT THE SCHOOL PROVIDE SUCH SERVICES. ADMINISTRATIVE APPEALS RESULTED IN A RULING FOR THE SCHOOL. ON APPEAL TO THE DISTRICT COURT, HOWEVER, THE JUDGE, RELYING ON TATRO V. TEXAS (THE 5TH CIRCUIT), RULED THAT THE SERVICE MUST BE PROVIDED, HOLDING THAT IT FELL WITHIN THE MEANING OF A "RELATED SERVICE" UNDER THE ACT. THE CORRECT INQUIRY, ACCORDING TO THE COURT, WAS NOT WHETHER THE RELATED SERVICE WAS "EDUCATION-SPECIFIC" BUT WHETHER IT WAS "REQUIRED TO ASSIST AMBER TO BENEFIT FROM HER SPECIAL EDUCATION."

THE DEPARTMENT OF EDUCATION, AS I MENTIONED EARLIER, IS REVIEWING SEVERAL ISSUES UNDER SECTION 504 AND 94-142. THE QUESTION OF WHAT IS A "RELATED SERVICE" IS ONE OF THESE. UNFORTUNATELY, THE WHOLE PROCESS IS CIRCUITOUS. THE COURTS CITE THE DEPARTMENT IN SUPPORT OF THEIR POSITION AND THE DEPARTMENT CITES THE COURTS IN SUPPORT OF THEIR POSITIONS. THE OPTIONS PAPER WHICH HAS BEEN DEVELOPED BY THE DEPARTMENT INCLUDES OTHER ISSUES SUCH AS WHEN IS A DISTRICT REQUIRED TO PROVIDE AN EXTENDED SCHOOL YEAR; OUT-OF-STATE PLACEMENT OF HANDICAPPED CHILDREN -- WHEN IS IT REQUIRED AND WHO PAYS FOR IT? WHETHER THE DUE PROCESS REQUIREMENTS AND THE PROVISIONS RELATING TO INDIVIDUALIZED EDUCATION PLANS SHOULD BE AMENDED.

AT THE RISK OF SOUNDING LIKE A CYNIC -- DON'T HOLD YOUR BREATH ON A QUICK DECISION ON THESE ISSUES.

CIVIL RIGHTS STATUTES

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, WHICH PROHIBITS DISCRIMINATION ON THE BASIS OF SEX, IS THE SUBJECT OF A CASE WHICH THE SUPREME COURT HAS AGREED TO REVIEW. ORAL ARGUMENTS IN THE CASE WILL BE HEARD NEXT WEEK. AT ISSUE IN NORTH HAVEN V. BELL IS THE QUESTION OF WHETHER TITLE IX APPLIES TO EMPLOYMENT. SEVERAL COURTS OF APPEALS HAVE RULED THAT THE LEGISLATIVE HISTORY OF TITLE IX INDICATES THAT CONGRESS INTENDED TITLE VII (WHICH PROHIBITS DISCRIMINATION IN EMPLOYMENT) TO BE THE EXCLUSIVE MEANS OF GETTING TO EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEX, WHILE TITLE IX WAS INTENDED TO PROTECT THE BENEFICIARIES OF CONGRESSIONAL FUNDING STATUTES. THE NORTH HAVEN CASE, HOWEVER, WENT THE OTHER WAY AND CITED THE LEGISLATIVE HISTORY AS PROOF THAT CONGRESS INTENDED TITLE IX TO COVER EMPLOYMENT.

ANOTHER TITLE IX CASE IS AWAITING A DECISION OF THE SUPREME COURT ON A PETITION FOR REVIEW. THAT CASE, DOUGHERTY V. BELL (OUT OF THE 5TH CIRCUIT), ALSO INVOLVES THE QUESTION OF WHETHER TITLE IX APPLIES TO EMPLOYMENT, BUT THE COURT REACHES THE ISSUE THROUGH ANOTHER -- A DIFFERENT -- ROUTE THAN THE TWO SIDES WHICH HAVE PREVIOUSLY RULED ON THE ISSUE. THE DOUGHERTY COURT HELD THAT HEW HAD THE AUTHORITY TO COVER EMPLOYMENT IN ITS REGULATION BUT THE EMPLOYMENT COVERAGE IS TOO BROAD. THAT IS, BEFORE AN EMPLOYMENT PRACTICE IS COVERED, IT MUST BE SHOWN THAT THE EMPLOYEES AFFECTED BY THE DISCRIMINATION ARE EMPLOYED IN A "FEDERALLY ASSISTED EDUCATION PROGRAM OR ACTIVITY" WHICH, SAYS THE COURT, MUST BE READ NARROWLY TO INCLUDE ONLY ACTIVITIES WHICH THEMSELVES RECEIVE FEDERAL FINANCIAL ASSISTANCE. THIS NARROW READING OF TITLE IX IS NOT NEW.

SINCE THE TITLE IX REGULATION WAS FIRST PROMULGATED BACK IN 1975, THE COLLEGIATE ATHLETICS ESTABLISHMENT HAS ARGUED THAT HEW HAS EXCEEDED ITS JURISDICTION UNDER TITLE IX BY ITS COVERAGE OF ATHLETICS. THE RATIONALE FOR THIS ARGUMENT IS THE SAME AS THAT USED BY THE DOUGHERTY COURT -- THAT IS, THAT SINCE ATHLETICS PROGRAMS DO NOT THEMSELVES RECEIVE FEDERAL FINANCIAL ASSISTANCE THEY ARE NOT "FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES" AND NOT SUBJECT TO THE NON-DISCRIMINATION PROVISION OF TITLE IX.

A CASE DECIDED IN FEBRUARY BY THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION (Othen v. U.S.) RULED THAT TITLE IX DOES NOT APPLY TO ATHLETICS. THE CASE AROSE OUT OF A COMPLAINT FILED AGAINST THE ANN ARBOR, MICHIGAN SCHOOL BOARD BY THE FATHER OF TWO FEMALE STUDENTS WHO HAD BEEN REMOVED BECAUSE OF THEIR SEX FROM THE ONE GOLF TEAM OFFERED BY THE DISTRICT. THE ISSUE OF WHETHER THE DISTRICT IS REQUIRED TO PROVIDE A SEPARATE TEAM FOR WOMEN WAS MOOTED BY THE DISTRICT'S VOLUNTARY FORMATION OF SUCH A TEAM, BUT THE PLAINTIFFS PRESSED THEIR CLAIM FOR ATTORNEYS' FEES AND, THEREFORE, THE COURT WAS FORCED TO DECIDE THE CASE ON ITS MERITS IN ORDER TO DETERMINE WHETHER THE PLAINTIFFS WOULD HAVE "PREVAILED" AND THUS WOULD HAVE BEEN ENTITLED TO ATTORNEYS' FEES UNDER THE CIVIL RIGHTS ATTORNEYS' FESS AWARDS ACT OF 1976.

THE DISTRICT JUDGE, ALBEIT RELUCTANTLY, DISAGREED WITH THE GOVERNMENT'S ANALYSIS, HOLDING THAT CONGRESS INTENDED A "PROGRAMMATIC APPROACH" INSTEAD OF AN "INSTITUTIONAL APPROACH" TO LIMIT THE SCOPE OF TITLE IX. "(D)IRECT FEDERAL FINANCIAL AID TO SPECIFIC EDUCATION PROGRAMS OR ACTIVITIES IS REQUIRED BEFORE THE STRUCTURES OF TITLE 9 CAN BE APPLIED."

IN A DISCUSSION OF THE LEGISLATIVE HISTORY OF TITLE IX, THE COURT NOTED THAT AN EARLIER VERSION OF THE STATUTE WAS INSTITUTIONAL IN NATURE, PROHIBITING "DISCRIMINATION UNDER ANY PROGRAM OR ACTIVITY CONDUCTED BY A PUBLIC INSTITUTION..." (EMPHASIS SUPPLIED). THAT VERSION ALSO FAILED TO INCLUDE THE SO-CALLED "PINPOINT" PROVISION IN TITLE IX WHICH LIMITS THE TERMINATION OF FEDERAL FUNDS TO "THE PARTICULAR PROGRAM, OR PART THEREOF, IN WHICH SUCH NONCOMPLIANCE HAS BEEN SO FOUND...."

THUS, THE COURT HELD THAT CONGRESS INTENDED THE NON-DISCRIMINATION REQUIREMENTS TO APPLY ONLY TO THE FUNDED PROGRAM OR ACTIVITY -- NOT TO THE FUNDED INSTITUTION.

HEW'S REGULATION STATES THAT THE NON-DISCRIMINATION REQUIREMENTS APPLY TO "EVERY RECIPIENT AND TO EACH EDUCATION PROGRAM OR ACTIVITY OPERATED BY SUCH RECIPIENT WHICH RECEIVES OR BENEFITS FROM (EMPHASIS PROVIDED) FEDERAL FINANCIAL ASSISTANCE." THE UNITED STATES IN AN AMICUS BRIEF FILED IN THE CASE ARGUED THAT ANN ARBOR RECEIVES IMPACT AID WHICH IS PLACED IN THE GENERAL FUND AND THEREFORE BENEFITS THE ATHLETICS PROGRAM. THIS ARGUMENT WAS REJECTED ON THE GROUND THAT "FEDERAL IMPACT AID...DOES NOT CONSTITUTE THE TYPE OF FEDERAL FINANCIAL ASSISTANCE TO A SPECIFIC EDUCATION PROGRAM OR ACTIVITY ENVISIONED BY TITLE 9." THE COURT ALSO POINTED OUT THAT SINCE THE AMOUNT OF FEDERAL IMPACT AID FUNDS GOING TO ANN ARBOR WAS ONLY TWELVE-HUNDREDTHS OF ONE PERCENT OF THE TOTAL BUDGET, "THIS DIMINIMUS PERCENTAGE OF THE DISTRICT'S TOTAL OPERATING BUDGET CANNOT FORM THE BASIS FOR INVOCATION OF TITLE 9.... THE ATHLETICS PROGRAM IS NOT ASSISTED BY IMPACT AID."

THIS OCTOBER, HOWEVER, A U.S. DISTRICT COURT IN PENNSYLVANIA RULED THAT HEW DOES INDEED HAVE AUTHORITY TO COVER ATHLETICS EVEN THOUGH SUCH PROGRAMS DO NOT RECEIVE DIRECT FUNDING. THAT CASE, HAFFER V. TEMPLE UNIVERSITY, AGREED WITH THE HEW POSITION THAT THE TERMINATION PROVISION IN TITLE IX IS NARROWER IN SCOPE THAN THE NON-DISCRIMINATION LANGUAGE. THE COURT ALSO NOTED SEVERAL ATTEMPTS TO AMEND TITLE IX TO EXCLUDE ATHLETICS, FINDING THESE UNSUCCESSFUL ATTEMPTS TO BE EVIDENCE OF CONGRESS' INTENTION TO COVER ATHLETICS.

NONE OF THE TITLE IX EMPLOYMENT CASES HAVE LOOKED AT THE AMOUNT OF FEDERAL FUNDING IN THEIR DETERMINATIONS AS TO WHETHER TITLE IX COVERS EMPLOYMENT. BOTH THE OTHEN AND HAFFER CASES SEEM TO INDICATE THEIR FEELINGS THAT THE AMOUNT OF FUNDING IS RELEVANT -- OTHEN CITING THE FACT THAT THE SCHOOL DISTRICT RECEIVED LESS THAN 12/100TH OF 1 PERCENT OF ITS BUDGET FROM IMPACT AID AND HAFFER CITING THE FACT THAT TEMPLE UNIVERSITY RECEIVES SOME 19 MILLION DOLLARS (OVER 10 PERCENT OF ITS BUDGET).

TWO CASES DECIDED UNDER SECTION 504 THIS YEAR REFUSED TO ADOPT A NARROW READING OF THAT STATUTE WHICH PROHIBITS DISCRIMINATION AGAINST HANDICAPPED PERSONS, ALTHOUGH THE NON-DISCRIMINATION LANGUAGE OF SECTION 504 IS MODELED AFTER THAT OF TITLE IX AND TITLE VI.

A SEX DISCRIMINATION CASE WAS DECIDED THIS YEAR BY THE SUPREME COURT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, WHICH PROHIBITS DISCRIMINATION IN EMPLOYMENT. THAT CASE, WASHINGTON COUNTY V. GUNTHER, INVOLVED THE ISSUE OF EQUAL PAY FOR EQUAL WORK. THE SUPREME COURT RULED IN THAT CASE, WHICH INVOLVED

FEMALE AND MALE PRISON GUARDS, THAT A CLAIM OF SEX DISCRIMINATION UNDER TITLE VII IS NOT BARRED MERELY BECAUSE THE WOMEN JAIL GUARDS (THE PLAINTIFFS IN THE CASE) DO NOT PERFORM WORK "EQUAL" TO THAT OF MALE JAIL GUARDS. THE WOMEN HAD ARGUED THAT THE COUNTY EVALUATED THE WORTH OF THEIR JOBS AND DETERMINED THAT THEY SHOULD BE PAID APPROXIMATELY 95% AS MUCH AS THE MALE OFFICERS; THAT IT PAID THEM ONLY ABOUT 70% AS MUCH, WHILE PAYING THE MALE OFFICERS THE FULL EVALUATED WORTH OF THEIR JOBS; AND THAT THE FAILURE OF THE COUNTY TO PAY PLAINTIFFS THE FULL EVALUATED WORTH OF THEIR JOBS CAN BE PROVED TO BE ATTRIBUTABLE TO INTENTIONAL SEX DISCRIMINATION.

THE COURT, IN A 5-4 DECISION, HELD FOR THE PLAINTIFF WOMEN. THE COURT WAS NOT CALLED UPON TO MAKE ITS OWN SUBJECTIVE ASSESSMENT OF THE VALUE OF THE JOBS, OR TO ATTEMPT BY STATISTICAL TECHNIQUE OR OTHER METHODS TO QUANTIFY THE EFFECT OF SEX DISCRIMINATION ON THE WAGE RATES -- IN OTHER WORDS, THIS IS NOT A "COMPARABLE WORTH" CASE. BUT WHAT DO PRISON GUARDS HAVE TO DO WITH TEACHERS? I HOPE NOT A LOT. BUT -- THIS CASE IS IMPORTANT BECAUSE WHERE THERE ARE A SUBSTANTIAL NUMBER OF WOMEN IN ONE CLASSIFICATION (SUCH AS COACHES FOR WOMEN'S TEAMS) AND CONVERSELY SUBSTANTIAL NUMBERS OF MEN IN ANOTHER SIMILAR CLASSIFICATION (SUCH AS COACHES FOR MEN'S TEAMS), THE COURTS WILL LOOK AT PAY DIFFERENTIALS. ALTHOUGH IT IS UNCLEAR WHAT THE SUPREME COURT WOULD DO WITH A CASE WHERE COMPARISONS OF RESPECTIVE DUTIES OF THE MEN AND WOMEN IN THE DIFFERENT CLASSIFICATIONS WOULD HAVE TO BE MADE BY THE COURT ITSELF; AT THE LEAST, THE COURT WILL LOOK AT OBJECTIVE SALARY STUDIES OF JOB CLASSIFICATIONS DONE BY THE EMPLOYER.

THE COURT HAS DENIED REVIEW OF A CASE INVOLVING AN ALLEGATION OF VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, WHICH PROHIBITS AGE DISCRIMINATION AGAINST PERSONS BETWEEN THE AGES OF 40 AND 70. THE CASE, MARKHAM V. GELLER, OUT OF THE 2ND CIRCUIT, HELD THAT A SCHOOL BOARD POLICY OF GENERALLY NOT HIRING TEACHERS WITH MORE THAN 5 YEARS OF EXPERIENCE IS DISCRIMINATORY AS A MATTER OF LAW IN VIEW OF THE HIGH CORRELATION BETWEEN EXPERIENCE AND MEMBERSHIP IN THE PROTECTED AGE GROUP. WE ARE APT TO BE HEARING MORE FROM THE AGE DISCRIMINATION ACT AS SCHOOL BOARDS ATTEMPT TO BUDGET CUT AND HIRE LESS EXPERIENCED -- AND THEREFORE, LESS EXPENSIVE, EMPLOYEES.

EQUAL PROTECTION - TESTING BIAS

SCHOOL BOARDS ARE GETTING "CATCH-22" TREATMENT ON THE QUESTION OF BASIC SKILLS. PARENTS COMPLAIN THAT THEIR KIDS CAN'T READ AND THE COURTS ARE INVALIDATING THE METHODS USED BY BOARDS TO ASSESS WHETHER THE KIDS CAN READ.

DEBRA P. V. TURLINGTON CHALLENGED A FLORIDA STATUTE WHICH REQUIRED PASSAGE OF A "FUNCTIONAL LITERACY" TEST BEFORE A HIGH SCHOOL DIPLOMA WOULD BE AWARDED. THE DISTRICT COURT HELD THAT, AS APPLIED TO BLACK STUDENTS, THE TEST VIOLATES THE EQUAL PROTECTION CLAUSE. THE COURT FOUND, CITING SPECIFIC INSTANCES OF PAST DISCRIMINATION IN FLORIDA, THAT SINCE THE FAILURE RATE OF BLACK STUDENTS IS DISPROPORTIONATELY HIGH, THE TEST "PERPETUATES AND RE-EMPHASIZES THE EFFECTS OF PAST PURPOSEFUL DISCRIMINATION REGARDLESS OF THE NEUTRALITY OF EITHER THE LEGISLATION OR THE STATE DEPARTMENT OF EDUCATION INTENT."

ON APPEAL TO THE FIFTH CIRCUIT, THE COURT RULED ON MAY 4 THAT THE STATE MUST SHOW THAT THE MATERIAL ON THE TEST WAS COVERED IN THE CURRICULUM. THE CIRCUIT COURT HAS REMANDED THE CASE TO DISTRICT COURT SO THAT THIS SHOWING MAY BE MADE.

A CASE OUT OF THE NORTHERN DISTRICT OF CALIFORNIA ALSO RULED AGAINST THE STATE'S USE OF TESTS TO DETERMINE STUDENT PLACEMENT. IN LARRY P. V. RILES THE COURT FOUND THAT THE STATE'S USE OF IQ TESTS FOR PLACEMENT OF BLACK CHILDREN IN CLASSES FOR THE EDUCABLE MENTALLY RETARDED VIOLATES TITLE VI OF THE CIVIL RIGHTS ACT. THE COURT ALSO DREW ATTENTION TO PROVISIONS IN THE REGULATION UNDER SECTION 504 OF THE REHABILITATION ACT AND IN THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT, WHICH REQUIRE THAT SCHOOL DISTRICTS PROVIDE A "FREE APPROPRIATE PUBLIC EDUCATION" TO HANDICAPPED CHILDREN.

THE COURT CITED LAU V. NICHOLS AS SUPPORT FOR ITS POSITION THAT PLACEMENT MECHANISMS SUCH AS THE IQ TESTS IN QUESTION "OPERATE WITH A DISCRIMINATORY EFFECT THAT EFFECTIVELY FORECLOSES A DISPROPORTIONATE NUMBER OF BLACK CHILDREN FROM ANY MEANINGFUL EDUCATION. ON THE BASIS OF THEIR DIFFERENT CULTURAL BACKGROUND, WHICH RESULTS IN LOWER SCORES ON IQ TESTS, BLACK CHILDREN ARE SUBJECTED TO DISCRIMINATION ANALOGOUS TO THAT FOUND VIOLATIVE OF TITLE 6 IN LAU." THE COURT OPINED THAT IT IS NOT SUFFICIENT THAT THE TEST BE VALIDATED FOR EACH MINORITY GROUP FOR WHICH IT MAY BE USED. IN ADDITION, EVEN IF THE STATE HAS MET THE "BURDEN OF SHOWING A SUFFICIENT RELATIONSHIP OF THE TEST-CENTERED PROCESS TO EDUCABLE MENTALLY HANDICAPPED STATUS, THE BLACK CHILDREN WOULD STILL BE ENTITLED TO PREVAIL BECAUSE THEY HAVE MET THEIR BURDEN OF SHOWING THAT ALTERNATE DEVICES FOR PLACEMENT EXIST."

THE COURT ACKNOWLEDGED THAT UNDER THE "PRESENT STATE OF THE LAW" THERE MUST BE A SHOWING OF DISCRIMINATORY INTENT, NOT SIMPLY IMPACT. HOWEVER, THE COURT WENT ON TO FIND THAT THE DECISION-MAKING PROCESS UNDER WHICH THE STATE ADOPTED THE REQUIREMENT OF THE TESTS WAS "MADE IN A VERY SUSPICIOUS AND INADEQUATE MANNER." THEREFORE, THE STATE WAS LEFT WITH THE BURDEN OF ESTABLISHING A "COMPELLING STATE INTEREST IN THE USE OF IQ TESTS AND IN THE MAINTENANCE OF EMR CLASSES WITH OVERWHELMING DISPROPORTIONS OF BLACK ENROLLMENT."

ALIEN CHILDREN

TWO CASES RELATING TO EDUCATION OF ILLEGAL ALIENS (OR UNDOCUMENTED RESIDENTS, WHICH IS THE EUPHEMISM FOR ILLEGAL ALIENS) ARE PENDING IN THE SUPREME COURT AS DIRECT APPEALS FROM THE STATE OF TEXAS. THE ISSUE HERE IS WHETHER THE STATE OF TEXAS VIOLATED THE PLAINTIFFS' EQUAL PROTECTION RIGHTS UNDER THE U.S. CONSTITUTION BY PASSING A STATUTE PROVIDING THAT THE STATE WILL NOT REIMBURSE LOCAL SCHOOL DISTRICTS FOR THE EDUCATION OF ILLEGAL ALIENS. AS A RESULT OF THAT STATUTE, SEVERAL TEXAS SCHOOL DISTRICTS ATTEMPTED TO CHARGE TUITION AND FOUND THEMSELVES IN COURT ALONG WITH THE STATE. THE PRIMARY ARGUMENT OF THE STATE IS THAT IT IS A FEDERAL OBLIGATION TO EITHER REIMBURSE STATES FOR THE EDUCATION OF SUCH CHILDREN OR TO ASSURE THAT THEY ARE DEALT WITH

THROUGH THE IMMIGRATION AND NATURALIZATION SERVICE MECHANISM. THE CASES WERE ARGUED BEFORE THE COURT YESTERDAY.

SEPARATION OF POWERS

AN IMMIGRATION CASE WHICH COULD BE IMPORTANT TO EDUCATION IS CHADHA V. IMMIGRATION AND NATURALIZATION SERVICE. THE CASE, IN WHICH THE SUPREME COURT HAS GRANTED REVIEW, INVOLVES THE CONSTITUTIONALITY OF THE ONE-HOUSE CONGRESSIONAL VETO. UNDER THE STATUTE AT ISSUE IN THE CASE, EITHER HOUSE OF CONGRESS MAY VETO A SUSPENSION OF DEPORTATION BY THE IMMIGRATION SERVICE. PURSUANT TO THE AUTHORITY IN THE STATUTE, THE HOUSE OF REPRESENTATIVES VOTED TO OVERTURN THE IMMIGRATION SERVICE, WHICH HAD SUSPENDED THE DEPORTATION OF PLAINTIFF CHADHA. CHADHA CHALLENGED THE VETO AS A VIOLATION OF THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS.

THE CASE IS IMPORTANT TO EDUCATION BECAUSE OF THE MANY EDUCATION STATUTES WHICH CONTAIN CONGRESSIONAL VETO PROVISIONS, MOST OF WHICH REQUIRE TWO-HOUSE VETO. LAST YEAR THE CONGRESS VETOED SEVERAL DEPARTMENT OF EDUCATION REGULATIONS PURSUANT TO THE LEGISLATIVE VETO PROVISIONS IN THE ACTS UNDER WHICH THE REGULATIONS WERE ADOPTED. BOTH THE DEPARTMENTS OF EDUCATION AND JUSTICE ARGUED THAT THE CONGRESSIONAL VETOES WERE A VIOLATION OF THE CONSTITUTION, BUT THE REGULATIONS WERE CHANGED ANYWAY TO AVOID A CONSTITUTIONAL CONFRONTATION.

IT HAS BEEN ARGUED IN THE PAST THAT THE EXECUTIVE BRANCH OFTEN EXCEEDS ITS AUTHORITY UNDER CONGRESSIONAL ENACTMENTS, AND YET CONGRESS HAS NO WAY OF SHOWING ITS CONCERN EXCEPT THROUGH

AMENDMENTS TO THE STATUTES. THEREFORE, THE CONGRESS HAS BEEN INCLUDING LEGISLATIVE VETO PROVISIONS IN THE STATUTES IN THE HOPE OF OVERTURNING REGULATIONS WHICH CONGRESS FEELS ARE NOT IN ACCORD WITH CONGRESSIONAL INTENT. A VERY COMPLEX ISSUE INDEED. THE ORAL ARGUMENTS SHOULD PROVE TO BE A FASCINATING EXERCISE IN POLITICAL HISTORY. HOW OFTEN, FOR EXAMPLE, DO WE ACTUALLY HEAR THE FEDERALIST PAPERS CITED IN CURRENT CASES?

DESEGREGATION

THE QUESTION OF DESEGREGATION OF PUBLIC SCHOOLS CONTINUES TO BE A THORNY ONE FOR THE COURTS. THE SUPREME COURT HAS GRANTED REVIEW OF TWO DESEGREGATION CASES. ONE, SEATTLE SCHOOL DISTRICT #1 V. WASHINGTON STATE, INVOLVES THE CONSTITUTIONALITY OF A STATE STATUTE WHICH PROHIBITS THE BUSING OF SCHOOL CHILDREN BEYOND THEIR NEIGHBORHOOD SCHOOL FOR THE PURPOSE OF DESEGREGATION. THE OTHER CASE, CRAWFORD V. BOARD OF EDUCATION OF LOS ANGELES, CHALLENGED THE CONSTITUTIONALITY OF A REFERENDUM WHICH AMENDED THE STATE CONSTITUTION TO PROHIBIT THE MANDATE OF DESEGREGATION IN THE ABSENCE OF A FINDING OF DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE. AS YOU KNOW, THE PREVIOUS STATE LAW MANDATED RACIAL BALANCE WHETHER OR NOT THE SEGREGATION IN THE SYSTEM WAS THE RESULT OF INTENTIONAL DISCRIMINATORY ACTIONS OF THE STATE OR LOCAL GOVERNMENT. AS A RESULT OF THAT EARLIER LAW, LOS ANGELES BECAME THE SUBJECT OF A MASSIVE BUSING ORDER.

FIRST AMENDMENT - FREEDOM OF RELIGION

THE FIRST AMENDMENT, GUARANTEEING THE RIGHTS OF FREE SPEECH AND FREEDOM FROM INTERFERENCE IN RELIGION, CONTINUES TO PLAY A MAJOR PART IN COURT DECISIONS INVOLVING SCHOOLS.

WITH REGARD TO DECISIONS RELATING TO RELIGIOUS LIBERTY -- WE ARE NOW GETTING THE CASES ON THE REVERSE SIDE OF THE "ESTABLISHMENT VS FREE EXERCISE" COIN. THE FIRST AMENDMENT PROHIBITS A STATE OR ARM OF THE STATE FROM "ESTABLISHING" RELIGION. UNDER THAT PROHIBITION THE SUPREME COURT HAS DECIDED CASES SUCH AS STONE V. GRAHAM -- DECIDED IN THE FALL OF 1980. IN THAT CASE, THE COURT HELD THAT THE KENTUCKY STATUTE WHICH REQUIRED THE POSTING OF A COPY OF THE TEN COMMANDMENTS ON THE WALLS OF EACH SCHOOL ROOM HAD A "PREEMINENT PURPOSE WHICH WAS PLAINLY RELIGIOUS IN NATURE."

THE OTHER SIDE OF THE FIRST AMENDMENT RELIGIOUS RIGHTS COIN IS THE RIGHT OF THE INDIVIDUAL TO THE FREE EXERCISE OF RELIGION. SCHOOLS, IN REACTION TO THE SUPREME COURT DECISIONS INVOLVING "ESTABLISHMENT", HAVE REFUSED TO ALLOW STUDENTS OR TEACHERS TO CONDUCT WHAT MIGHT BE INTERPRETED AS RELIGIOUS ACTIVITIES ON SCHOOL GROUNDS. AS A RESULT, THE SCHOOLS HAVE BEEN SUED BY INDIVIDUALS CLAIMING THAT THEIR INDIVIDUAL FREE EXERCISE RIGHTS HAVE BEEN VIOLATED.

SO WE NOW HAVE A PETITION FOR SUPREME COURT REVIEW OF A CASE IN WHICH THE SCHOOL BOARD REFUSED TO PERMIT HIGH SCHOOL STUDENTS TO CONDUCT COMMUNAL PRAYER MEETINGS ON SCHOOL PREMISES BEFORE COMMENCEMENT OF CLASSES. THE 2ND CIRCUIT COURT OF APPEALS RULED THAT THE REFUSAL DID NOT VIOLATE THE STUDENTS' FIRST AMENDMENT RIGHTS TO FREE EXERCISE OF RELIGION, SPEECH AND ASSOCIATION.

ANOTHER CASE WAS RECENTLY ARGUED BEFORE THE SUPREME COURT. THAT CASE, WIDMAR V. VINCENT, INVOLVES THE CONSTITUTIONALITY OF A BAN BY THE UNIVERSITY OF MISSOURI ON A STUDENT GROUP'S USE OF CAMPUS FACILITIES FOR RELIGIOUS SERVICES AND RELIGIOUS TEACHING. THE COLLEGE ARGUED THAT SUCH USAGE OF CAMPUS FACILITIES WENT BEYOND "ACCOMMODATION" AND SERVES INSTEAD TO ADVANCE RELIGION BY PROVIDIIIG FINANCIAL AID WITH PUBLIC TAX DOLLARS AND BY APPEARING TO GIVE UNIVERSITY APPROVAL TO THE STUDENTS' RELIGIOUS EFFORTS.

THE STUDENTS' LAWYER, ON THE OTHER HAND, ARGUED THAT THE UNIVERSITY HAS THE BURDEN OF JUSTIFYING A REGULATION THAT RESTRICTS FREEDOM OF SPEECH. HE ARGUED THAT THIS IS NOT THE TYPE OF AID TO RELIGIONS WHICH THE FOUNDING FATHERS INTENDED TO PROHIBIT.

THE SUPREME COURT HAS DENIED REVIEW OF AN 8TH CIRCUIT DECISION WHICH HELD THAT A SCHOOL DISTRICT RULE THAT EXPRESSLY PROVIDES THAT RELIGIOUS HOLIDAYS MAY BE OBSERVED IN THE PUBLIC SCHOOLS AND THAT RELIGIOUS MUSIC, LITERATURE AND SYMBOLS MAY BE USED DURING THESE OBSERVANCES TO PORTRAY THE CULTURAL AND RELIGIOUS HERITAGE OF THE HOLIDAY. THE GROUND, OF COURSE, BEING THAT THERE WAS A SECULAR REASON AND EDUCATIONAL PURPOSE FOR THE OBSERVANCES OF SUCH HOLIDAYS AND FOR THE USE OF MUSIC, LITERATURE, ETC. IN CLASSROOMS.

FIRST AMENDMENT - FREE SPEECH

THE SUPREME COURT HAS GRANTED REVIEW OF THE FIRST AMENDMENT CASE INVOLVING THE QUESTION OF WHETHER A SCHOOL BOARD MAY CONSTITUTIONALLY CENSOR SCHOOL LIBRARY BOOKS. THE CASE IS ISLAND TREES UNIFIED SCHOOL DISTRICT V. PICO.

THE 2ND CIRCUIT HELD THAT THE SCHOOL BOARD VIOLATED THE FREE SPEECH RIGHTS OF THE STUDENTS AND PUBLIC BY CENSORING CERTAIN BOOKS FOR WHAT THE COURT HELD WERE "POLITICAL" REASONS. ON THE SAME DAY THAT IT CAME DOWN WITH THE DECISION IN PICO, THE 2ND CIRCUIT HELD IN ANOTHER CASE THAT THE SCHOOL BOARD DID NOT VIOLATE THE FIRST AMENDMENT BY CENSORING CERTAIN LIBRARY BOOKS BECAUSE THE BOARD FELT THEY WERE PORNOGRAPHIC. THE REAL ISSUE -- IT WOULD APPEAR -- HOWEVER, IS NOT WHETHER THE BOARD HAS THE RIGHT TO CENSOR LIBRARY BOOKS FOR "POLITICAL" REASONS, BUT WHETHER THE STUDENTS HAVE A FIRST AMENDMENT RIGHT TO THE BOOKS IN THE LIBRARY. IS THE SCHOOL LIBRARY, IN LAW, LIKE THE PUBLIC LIBRARY? OR -- DO SCHOOL LIBRARY BOOKS HAVE TENURE?

A CASE OUT OF THE 7TH CIRCUIT LAST YEAR HELD THAT THERE IS NO FIRST AMENDMENT RIGHT TO PARTICULAR TEXTBOOKS AND THE SCHOOL BOARD HAS THE RIGHT TO CENSOR TEXTBOOKS FOR ANY REASON WHATEVER -- BARRING VIOLATION OF SOME OTHER RIGHT SUCH AS EQUAL PROTECTION.

SEARCH AND SEIZURE

ONE AMENDMENT TO THE CONSTITUTION WHICH ONE WOULD THINK WOULD CLEARLY NOT APPLY TO SCHOOL DISTRICTS IS THE FOURTH AMENDMENT WHICH PROVIDES THAT PERSONS SHALL BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES. BUT -- LO AND BEHOLD! -- WE HAVE A PUBLIC OUTCRY AGAINST DRUGS IN THE SCHOOLS AND THE SCHOOL AUTHORITIES ARE FACED WITH THE DILEMMA OF HOW TO DEAL WITH THE PROBLEM.

CRIMINAL CASES INVOLVING THE FOURTH AMENDMENT USUALLY REQUIRE A WARRANT FOR A SEARCH UNLESS THERE IS PROBABLE CAUSE TO SUPPORT THE SEARCH, SUCH AS WHERE A POLICE OFFICER SEES A DEFENDANT HIDE SOMETHING -- THE GUN OR SOMETHING WHICH IS CLEARLY AN ILLEGAL DRUG. HOWEVER, IF A SCHOOL DISTRICT IS ACTING IN THE ROLE OF PARIENS PATRIA -- THAT IS, ACTING IN THE PLACE OF THE PARENT -- DIFFERENT RULES MAY APPLY. THE QUESTION, OF COURSE, ARISES AS TO WHEN THE SCHOOL IS ACTING FOR THE PARENT AND WHEN IT IS ACTING FOR THE LAW ENFORCEMENT OFFICERS.

THE SUPREME COURT HAS DENIED REVIEW OF A CASE, DOE V. RENFROW, WHICH HAS BECOME THE LEADING CASE ON SO-CALLED "SNIFF DOG" SEARCHES. IN THAT CASE THE WARRANTLESS SCHOOL ROOM DRUG SEARCH WAS CONDUCTED BY SCHOOL ADMINISTRATORS WITH THE ASSISTANCE OF POLICE AND DRUG DETECTING DOGS, WHICH RESULTED IN THE DOG "ALERTING" TO A 14-YEAR-OLD GIRL. THE SCHOOL SUBMITTED THE GIRL TO A STRIP SEARCH BUT FOUND NO DRUGS. IT WAS LATER DETERMINED THAT THE GIRL HAD BEEN PLAYING WITH HER DOG THAT MORNING. THE DOG WAS IN HEAT. THE 7TH CIRCUIT UPHELD THE LOWER COURT'S FINDING

THAT THERE WAS NO FOURTH AMENDMENT VIOLATION FOR THE INITIAL SEARCH, BUT THAT THERE WAS A VIOLATION WHEN THE STRIP SEARCH WAS CONDUCTED. THE CASE HAS BEEN SENT BACK FOR A DETERMINATION OF DAMAGES. THE COURT IN RENFROW FOUND THAT CERTAIN FACTORS SUCH AS THE STUDENT'S AGE, THE STUDENT'S HISTORY AND RECORD IN SCHOOL, THE SERIOUSNESS AND PREVALENCE OF THE PROBLEM TO WHICH THE SEARCH IS DIRECTED, AND THE EXIGENCY REQUIRING AN IMMEDIATE WARRANTLESS SEARCH, SHOULD ALL BE CONSIDERED BEFORE MAKING A SEARCH OF THE BODY OF THE STUDENT. LOCKER SEARCHES SEEM TO FARE BETTER AND WHERE THE POLICE ARE NOT INVOLVED, IT IS ALWAYS EASIER TO ARGUE THAT SEARCHES ARE BEING MADE FOR THE PROTECTION OF THE STUDENTS AND NOT FOR LAW ENFORCEMENT PURPOSES.

ATTORNEYS' FEES ACT

ONE MORE CIVIL RIGHTS ISSUE SHOULD BE MENTIONED WHICH ARISES OUT OF THE SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871. THAT ACT PROVIDES THAT EVERY PERSON WHO, UNDER COLOR OF ANY STATE LAW, SUBJECTS ANY PERSON TO THE DEPRIVATION OF ANY RIGHTS SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE TO THE PARTY INJURED.

BASICALLY, WHAT THAT MEANS IS THAT IF IT IS FOUND THAT A STUDENT OR AN EMPLOYEE HAS BEEN SUBJECTED TO DISCRIMINATION OR HAS BEEN DEPRIVED OF HIS EQUAL PROTECTION RIGHTS OR FOURTH AMENDMENT RIGHTS, OR ANY OTHER PROTECTED RIGHT -- THE PERSON WHO TOOK THAT UNLAWFUL ACTION MUST PAY DAMAGES.

THERE IS SOME LIMITED IMMUNITY -- BUT TIME PREVENTS MY GOING INTO THAT ISSUE. THE ONE ISSUE I WANT TO ADDRESS IS THE QUESTION

OF ATTORNEYS' FEES. THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 PROVIDES THAT THE "PREVAILING PARTY" IN A SECTION 1983 LAWSUIT HAS THE RIGHT TO ATTORNEYS' FEES. THIS IS IMPORTANT BECAUSE IN MANY CASES -- PARTICULARLY CASES INVOLVING STUDENTS -- IT IS DIFFICULT TO PROVE ANYTHING MORE THAN MINIMAL DAMAGES. HOWEVER, THE ATTORNEYS' FEES MAY BE ENORMOUS, PARTICULARLY IF THERE ARE APPEALS. ATTORNEYS' FEES MAY EVEN BE FORTHCOMING WHERE THE CASE HAS BEEN SETTLED OUT OF COURT, A CONSENT DECREE HAS BEEN ENTERED OR EVEN WHERE ONLY A PRELIMINARY INJUNCTION HAS BEEN ISSUED. I WOULD SUGGEST IN ALL CASES TO PROVIDE IN ANY SETTLEMENT AGREEMENT THAT THE PLAINTIFF WAIVES ANY RIGHT TO ATTORNEYS' FEES. OR, SOMETHING TO THE EFFECT THAT NOTHING IN THE AGREEMENT SHOULD BE INTERPRETED AS MAKING ONE OR THE OTHER PARTY THE "PREVAILING PARTY" FOR PURPOSES OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARD ACT.

LIABILITY OF PARENTS FOR ACTS OF STUDENTS

THE SUPREME COURT HAS DENIED REVIEW OF A CASE OUT OF NEW JERSEY WHICH MAY PROVIDE A WAY FOR SCHOOL BOARDS TO COPE WITH THE EVER RISING COSTS OF VANDALISM. THE NEW JERSEY SUPREME COURT HAS UPHELD THE CONSTITUTIONALITY OF A 114-YEAR-OLD, LITTLE-USED STATE STATUTE THAT IMPOSES VICARIOUS LIABILITY WITHOUT FAULT ON THE PARENT OR GUARDIAN OF ANY PUPIL WHO DAMAGES PUBLIC SCHOOL PROPERTY. IN BOARD OF EDUCATION OF PISCATAWAY TWP. V. CAFFIERO, THE PLAINTIFF BOARD OF EDUCATION SOUGHT RECOVERY FROM THE PARENTS OF SEVERAL STUDENTS AFTER THE STUDENTS HAD CAUSED EXTENSIVE DAMAGE

TO LOCAL SCHOOL PROPERTY. THE DEFENDANT PARENTS ARGUED THAT THE IMPOSITION OF LIABILITY WITHOUT FAULT ON THEM WAS UNCONSTITUTIONAL.

AGREEING WITH THE PARENTS, THE TRIAL COURT FOUND THAT THE STATUTE IN QUESTION VIOLATED DUE PROCESS AND WAS THUS UNCONSTITUTIONAL AND VOID. A DIVIDED APPELLATE COURT, HOWEVER, DISAGREED AND REVERSED, WITH THE DISSENTING JUDGE ARGUING THAT IMPOSING LIABILITY BASED SOLELY ON THE STATUS OF THE DEFENDANTS AS PARENTS WAS LOGICALLY NO DIFFERENT FROM IMPOSING LIABILITY BASED ON EVEN MORE TENUOUS RELATIONSHIPS, SUCH AS THAT OF GRANDPARENT, UNCLE OR EVEN WITNESS TO THE CRIME.

IN UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE, THE STATE SUPREME COURT COUNTERED THE DISSENT'S CLAIM THAT THE STATUTE WAS ARBITRARY BY TURNING TO ITS PRIOR HISTORY. THE STATUTE WAS FIRST ENACTED IN 1867 AS PART OF AN ACT ESTABLISHING THE STATE'S PUBLIC SCHOOL SYSTEM, WAS RE-ENACTED IN 1907, AND WAS CODIFIED IN ITS PRESENT FORM IN 1967. APPLICATION OF THE STATUTE WAS LIMITED BY SEVERAL FACTORS, ACCORDING TO THE COURT'S INTERPRETATION -- IT ONLY APPLIED TO PARENTS OF CHILDREN ACTUALLY ATTENDING PUBLIC SCHOOLS, AND DAMAGES COULD ONLY BE COLLECTED FOR WILLFUL OR MALICIOUS ACTS OF THE CHILD, NOT THOSE THAT WERE NEGLIGENT OR WITHOUT FAULT.

EDUCATIONAL MALPRACTICE

PLAINTIFFS CONTINUE TO SEEK DAMAGES FOR EDUCATIONAL MALPRACTICE -- AND CONTINUE TO LOSE. LAST SPRING, THE 4TH CIRCUIT DECIDED A CASE (SANDLIN V. JOHNSON) WHICH WAS BROUGHT UNDER SECTION 1983 AS AN EQUAL PROTECTION CASE CHALLENGING THE ACTION OF THE SCHOOL DISTRICT IN DENYING SECOND GRADE STUDENTS PROMOTION TO 3RD GRADE BECAUSE OF THEIR FAILURE TO COMPLETE THE REQUISITE LEVEL OF GINN READING SERIES. THE COURT HELD THAT DECISIONS OF EDUCATIONAL AUTHORITIES WHICH TURN ON EVALUATION OF ACADEMIC PERFORMANCE ARE PECULIARLY WITHIN THE EXPERTISE OF EDUCATORS AND ARE INAPPROPRIATE FOR REVIEW IN A JUDICIAL CONTEXT.

THAT -- IS A SUMMARY OF THE STATE OF SCHOOL LAW TODAY. THE ONLY CLEAR HYPOTHESIS ONE CAN GLEAN FROM ALL THIS IS THAT PERHAPS WE SHOULD HEED THE ADVICE OF WILLIAM SHAKESPEARE ON THE QUESTION OF HOW TO BUILD THE PERFECT SOCIETY: "FIRST, LET'S KILL ALL THE LAWYERS".